Cornerstone Builders, Inc., and its alter ego Miracle Construction Services, Limited, d/b/a M.C.S., Ltd. *and* Painters District Council No. 2, a/w International Brotherhood of Painters and Allied Trades, AFL–CIO *and* Joseph Shatro, as Managing Trustee of The Painters District Council No. 2 Pension, Welfare, Group Insurance, Vacation and Apprenticeship and Journeyman Training Trusts. Cases 14–CA–20825 and 14–CA–20825–2

April 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On December 10, 1990, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the Charging Parties filed an answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cornerstone Builders, Inc., and its alter ego Miracle Construction Services, Limited, d/b/a M.C.S., Ltd., Bridgeton, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] No exceptions were filed to the judge's findings that Cornerstone Builders, Inc., and Miracle Construction Services, Ltd. were alter egos, that the Union enjoyed majority status under Sec. 9(a) of the Act when the Respondent recognized it, and that there was a valid contract in effect between the parties.

Lucinda Flynn, Esq., for the General Counsel.
Eric J. Snyder, Esq. (Snyder, Wier, Shaller & Bachman), of St. Louis, Missouri, for the Respondents.
Jan Bond, Esq., and, on brief, *Richard P. Perkins, Esq. (Diekemper, Hammond, Shinners, Turcotte & Larrew, P.C.)*, of St. Louis, Missouri, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case was tried before me on October 4, 1990,[1] in St. Louis, Missouri, on charges filed under the National Labor Relations Act (the Act) on June 19 by Painters District Council No. 2, a/w International Brotherhood of Painters and Allied Trades, AFL–CIO (the Union) in Case 14–CA–20825, and on charges filed on August 3 by Joseph Shatro, as managing trustee of The Painters District Council No. 2, Pension, Welfare, Group Insurance, Vacation and Apprenticeship and Journeyman Training Trusts (the trust funds) in Case 14–CA–20825–2, and on an original complaint and notice of hearing that was issued on July 27 by General Counsel, and on an original order consolidating cases, amended consolidated complaint and notice of hearing (the complaint) that was issued on August 8 by General Counsel against Cornerstone Builders, Inc. and Miracle Construction Services, Limited, d/b/a M.C.S., Ltd. (Cornerstone, Miracle, and/or the Respondents). The charges and the complaints allege that, as alter egos, Respondents have violated Section 8(a)(5) and (1) of the Act by various acts and conduct. Respondents filed an answer to the complaint admitting jurisdiction and the appropriateness of the employee unit involved,[2] but denying any alter ego status between them and denying the commission of any unfair labor practices.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Prior to February 28, Cornerstone was a corporation with an office and place of business in Bridgeton, Missouri, where it was engaged as a drywall and painting contractor in the building and construction industry. During the 12-month period ending February 28, Cornerstone, in the course and conduct of said operations, performed services valued in excess of $50,000 directly for various enterprises located in Missouri, each of which enterprises satisfies an appropriate standard for the assertion of jurisdiction by the Board other than solely an indirect standard. Miracle is, and has been at all times since about March 1, a corporation with an office and place of business in Bridgeton, Missouri, where it has been engaged as a drywall and painting contractor in the building and construction industry. Annually, Miracle, in the course and conduct of said operations performs services valued in excess of $50,000 directly for various enterprises located within Missouri, each of which enterprises satisfy an appropriate standard for the assertion of jurisdiction by the Board other than solely an indirect standard. Accordingly, I find that Cornerstone and Miracle are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

There is no significant issue of fact.

[1] All dates are in 1990 unless otherwise indicated.

[2] The unit, basically painters and drywall hangers, is set out completely in the conclusions of Law infra.

[3] There are several errors in the transcript, including erroneous indications of which lawyer, or the judge, is speaking. Theses errors are obvious, and no motion to correct the record has been filed. However, I am constrained to note that I never referred to any counsel by use of the counsel's first name.

In 1982 Cornerstone began operating out of the St. Louis area home of David DeGeare (DeGeare) and his wife Melody. DeGeare was Cornerstone's sole owner and president; Melody was the corporate secretary. In 1983 Cornerstone voluntarily recognized the Union as the collective-bargaining representative of its painters and signed a contract.

On June 27, 1988, the Union sent DeGeare a letter stating that, pursuant to *John Deklewa & Sons*,[4] the Union was then requesting recognition on the basis of authorization cards that it had received from a majority of the unit employees and offered to show the cards to an employer representative. The Union enclosed a form for granting recognition based on such evidence of majority status, and it stated that if the form was not signed and returned, the Union would petition for an election with the NLRB. On July 23, DeGeare signed the form which states:

> The Union claims, and the Employer acknowledges and agrees, that a majority of its employees has authorized the Union to represent them in collective bargaining. The Employer agrees to recognize, and does hereby recognize, the Union as the collective-bargaining agent for all employees performing painting, taping, wall-paper hanging and other unit work on all present and future job sites within the jurisdiction of the Union.

DeGeare transmitted this signed form to the Union on August 22. On October 24, DeGeare, on behalf of Cornerstone, signed another contract with the Union which recites as its effective dates as September 1, 1988, to August 31, 1991. Thereafter, until February 28, Cornerstone abided by the contract in many respects, including its wage levels and certain fringe benefits.

At the hearing, DeGeare admitted that he became aware in January or February that the Union was contemplating suing Cornerstone over an alleged failure to make payments to certain funds as required by the 1988–1991 contract. DeGeare was asked on cross-examination and testified:

> Q. And the reason Cornerstone went out of business is because you were tired of being harassed by the Painters district council, isn't that correct?
>
> MR. SNYDER: Objection, your honor.
>
> JUDGE EVANS: Overruled.
>
> MR. SNYDER: It's inflammatory.
>
> JUDGE EVANS: Overruled.
>
> By Ms. Flynn
>
> Q. Isn't that correct?
>
> A. To some degree; that's not the only reason.
>
> Q. Well, I'm asking you if that was a reason, that you were tired of being harassed by the Painters District Council and you wanted out?
>
> A. Yes, ma'am, that was a reason.

Neither DeGeare in his testimony, nor Counsel on brief, suggested any other reason for Cornerstone's going out of business.

DeGeare admitted that Cornerstone gave no notice to the Union about its going out of business on February 28.

Miracle began operations on March 1. Melody DeGeare owns 75 percent of its stock and is its president. Chris Whitney, a former supervisor for Cornerstone, owns the other 25 percent and is Miracle's construction manager. DeGeare is Miracle's corporate secretary. Miracle also operates out of the DeGeare's home, and it uses the same equipment. Miracle assumed the responsibility of completing all outstanding contracts of Cornerstone. Whitney and DeGeare supervise the employees, just as they did when all concerned were employed by Cornerstone. Miracle employs the same employees who were employed by Cornerstone, but it pays lower wages and no other benefits. Miracle does not observe the 1988–1991 contract in any fashion.

Miracle has a smaller volume of business than did Cornerstone, and it emphasizes residential, over commercial, painting and drywall work. Other than that, the operations are the same.

The only factual issue in this case involves a threat, or several threats, by Union Business Representative Jim Engle to DeGeare. On direct examination DeGeare testified that after he received the June 22 request for recognition as majority representative, and before he signed it on July 23, Engle called him once and, ''He said he would put a picket up, or put men out on the job with umbrellas to picket the project that I was working on.'' DeGeare testified that it was at the point of this threat that he signed the form. On cross-examination, DeGeare stated that it was several times that Engle so threatened him.

An initial problem with DeGeare's testimony, besides its enlargement with the telling, is the undisputed fact that Cornerstone had no employees working at any jobsite between June 22 and July 23. That fact was pointed out to DeGeare, but he offered no explanation, and Respondents suggest none on brief.

On these factors I would discredit DeGeare; moreover, Engle testified credibly about any such threat(s).[5]

B. *Analysis and Conclusions*

As its primary defense to the complaints, Respondents urge that the 1988–1991 contract is a nullity. The basis for the argument is that the agreement provides that the Union will furnish a completed copy to the Employer, and the Union never did so. DeGeare acknowledged at trial that he never complained to the Union about its failure to return a completed copy; DeGeare further acknowledged abiding by the contract after his signing it on October 24, 1988; and Respondents make no argument that the Union ever failed to abide by the contract after that date. Respondents cite no authority for the proposition that the Union's failure to get Cornerstone a completed copy of the contract is a material breech which would render the contract void, and, under the circumstances here, there is no reason to hold any such thing.

Respondents further rely on the testimony of Joseph Shatro, business agent and trustee, who acknowledged on cross-examination that he could not remember when he signed the 1988–1991 contract, and he further acknowledged that the Union's files contains a copy signed by DeGeare, but not by him. However, even if Shatro did not sign the contract before this action commenced, both parties, for a

[4] 282 NLRB 1375 (1987).

[5] Assuming that such a threat was made, Respondents suggest no theory of illegality. A threat to picket ''the job'' is not, per se, a threat of unlawful secondary activity.

time, treated the contract as if it were in effect, and the law assumes that it was (and is).[6]

Respondents are owned, in whole or majority part, by members of the same family, David and Melody DeGeare, who are husband and wife. Therefore, there is ''substantially identical'' ownership and control of Respondents for purposes of determining alter ego status.[7] Also, Respondents have a common business purpose, painting and drywall. Miracle assumed the customer base of Cornerstone and completed its contracts. The operations are the same, being conducted out of the DeGeare's house using the same equipment under the supervision of David DeGeare. Therefore, all elements necessary to find an alter ego status have been proved, as I find and conclude.[8]

Finally, ''a'' reason that Miracle was formed was in order that Cornerstone could evade its contractual obligations to the Union (considered harassment by DeGeare) and its statutory obligations to the employees.

Respondents argue that under *Deklewa*, supra, *General Extrusion Co*., 121 NLRB 1165 (1958), and other lines of cases, Respondents could have petitioned for an election or the employees could have petitioned for a decertification election, and if the Union had lost, the Respondents could have, of course, refused to bargain. Even granting to Respondents the numerous assumptions, and assumptions upon assumptions, involved in this argument, the fact is that there were no such petitions, and the device of self-help, by simply ceasing to recognize the Union and creating an alter ego, is not available to employers to avoid their responsibilities under the law.

When DeGeare signed the voluntary recognition form on July 23, 1988, the Union was established as the collective-bargaining representative of Cornerstone's employees under Section 9(a) of the Act. Then, as such representative, the Union secured DeGeare's signature on the 1988–1991 contract. Thereafter, DeGeare was not free to repudiate, midterm, the contract which he had freely executed. Because the parties are in the building and construction industry, the agreement would also be enforceable for the duration of its stated term under Section 8(f) of the Act, even if the Union had not established itself as a 9(a) representative.[9] Therefore, whether the 1988–1991 contract is considered to be the product of Section 9, or Section 8(f) of the Act, Cornerstone was not at liberty to repudiate the agreement by the artifice of shuffling the corporate stock, changing the name of the operation, and transferring the unit employees to Miracle, the corporation created by Respondents to avoid their contractual and statutory duties under Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Cornerstone Builders, Inc., and Respondent Miracle Construction Services, Limited, d/b/a M.C.S., Limited, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Painters District Council No. 2, a/w International Brotherhood of Painters and Allied Trades, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Miracle Construction Services, Limited, is, for the purpose of this proceeding, the alter ego of Respondent Cornerstone Builders, Inc.

4. All journeyman painters, tapers and drywall finishers, paper and wallcovering hangers, apprentices, pre-apprentices, summer help and working foremen employed by Cornerstone Builders, Inc., and by its alter ego Miracle Construction Services, Limited, but excluding office clerical and professional employees, and guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material, the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

6. By transferring employees in the unit from the payroll of Respondent Cornerstone Builders, Inc., to the payroll of Respondent Miracle Construction Services, Limited; by withdrawing recognition of the Union as the exclusive collective-bargaining representative of the employees in the unit; by unilaterally changing rates of pay, hours of employment, benefits and other terms and conditions of employment included in the collective-bargaining contract covering the unit employees; and by repudiating said collective-bargaining agreement, Respondents have violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondents must be ordered to adhere to the terms and conditions of the collective-bargaining agreement with the Union effective September 1, 1988, through August 31, 1991, and make whole the unit employees for any loss of wages and benefits since March 1, 1990, due to the Respondents' unlawful unilateral conduct in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondents must also be ordered to make the contractually required payments to the fringe benefit funds they unlawfully failed to make, as determined at the compliance stage of this proceeding. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Respondents shall also reimburse its unit employees for any expenses caused by Respondents' unlawful failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

[6] *Bi-County Beverage Distributors*, 291 NLRB 466 (1988), and cases cited therein at 468.

[7] *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

[8] *Advance Electric*, 268 NLRB 1001 (1984), and cases cited therein.

[9] See *John Deklewa & Sons*, supra.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Cornerstone Builders, Inc., and its alter ego Miracle Construction Services, Limited, of Bridgeton, Missouri, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Painters District Council No. 2, a/w International Brotherhood of Painters and Allied Trades, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit by transferring employees in the unit from the payroll of Respondent Cornerstone Builders, Inc., to the payroll of Respondent Miracle Construction Services, Limited; by withdrawing recognition of the Union as the exclusive collective-bargaining representative of the employees in the unit; by unilaterally changing rates of pay, hours of employment, benefits and other terms and conditions of employment included in the collective-bargaining contract covering the unit employees; and by repudiating said collective-bargaining agreement. The unit is:

> All journeyman painters, tapers and drywall finishers, paper and wallcovering hangers, apprentices, pre-apprentices, summer help and working foremen employed by Cornerstone Builders, Inc., and by its alter ego Miracle Construction Services, Limited, but excluding office clerical and professional employees, and guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Adhere to the terms and conditions of the collective-bargaining agreement with the Union effective September 1, 1988, through May 31, 1991, including, but not limited to, its provisions governing hourly wage rates and health and welfare, pension, and apprenticeship fund payments.

(b) Make whole the unit employees for losses of wages as a result of the Respondents' unlawful failure to pay contractually required hourly wage rates since March 1, 1990, in the manner set forth in the remedy section of this decision.

(c) Make the contractually required contributions to the benefit funds that the Respondents unlawfully failed to make since March 1, 1990, in the manner set forth in the remedy section of this decision.

(d) Make whole the unit employees for any losses that occurred as a result of the Respondents' failure to make required benefit fund payments in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Bridgeton, Missouri, place of business copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Painters District Council No. 2, a/w International Brotherhood of Painters and Allied Trades, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit by transferring employees in the unit from the payroll of Cornerstone Builders, Inc., to the payroll of Miracle Construction Services, Limited, by withdrawing recognition of the Union as the exclusive collective-bargaining representative of the employees in the unit, by unilaterally changing rates of pay, hours of employment, benefits and other terms and conditions of employment included in the collective-bargaining contract covering the unit employees, or by repudiating said collective-bargaining agreement. The unit is:

> All journeyman painters, tapers and drywall finishers, paper and wallcovering hangers, apprentices, pre-apprentices, summer help and working foremen employed by Cornerstone Builders, Inc., and by its alter ego Miracle Construction Services, Limited, but excluding office clerical and professional employees, and guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL adhere to the terms and conditions of the collective-bargaining agreement with the Union effective September 1, 1988, through May 31, 1991, including, but not limited to, its provisions governing hourly wage rates and health and welfare, pension, and apprenticeship fund payments.

WE WILL make whole the unit employees for losses of wages as a result of the our unlawful failure to pay contractually required hourly wage rates since March 1, 1990, plus interest.

WE WILL make the contractually required contributions to the benefit funds that we have unlawfully failed to make since March 1, 1990, and

WE WILL make whole the unit employees for any losses that occurred as a result of our failure to make such payments, plus interest.

CORNERSTONE BUILDERS, INC., AND ITS ALTER EGO MIRACLE CONSTRUCTION SERVICES, LIMITED, D/B/A M.C.S., LTD.